SUPREME COURT, U. S.

APR 17 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 387

ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION, MONTANA, *Petitioners*,

v.

R. T. NORDWICK, Executor of the will and estate of ARTHUR L. NORDWICK, deceased, *et als.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BARTON J. SOSTRIN,
1226 — 19th Street, N. W.,
Washington, D. C. 20036,
Counsel for Petitioners.

FREDERICK BERNAYS WIENER,
1760 Pennsylvania Avenue, N. W.,
Washington, D. C. 20006,

JOHN M. SCHILZ,
Electric Building,
Billings, Montana 59101,

Of Counsel.

Supreme Court Press, Inc., Washington, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
A. The basic statutes	3
B. Nordwick's entries and the leasing of the reserved oil and gas	4
C. Conveyance of the Tribes' reserved oil and gas without notice to them	6
D. Proceedings in the district court	7
E. Proceedings in the court below; views of the United States expressed at court's request	8
Reasons for granting the writ	9
Conclusion	15
Appendix A—Opinion below	A1
Appendix B—Judgment below	A11
Appendix C—Statutes involved	A11

AUTHORITIES

CASES:

Burnet v. *Chicago Portrait Co.*, 285 U. S. 1	11
Carpenter v. *Shaw*, 280 U. S. 363	14
Civil Aeronautics Board v. *Delta Air Lines*, 367 U. S. 316	11
Fishgold v. *Sullivan Drydock Corp.*, 328 U. S. 275	11
Haley v. *Seaton*, 281 F. 2d 620	4
Maritime Board v. *Isbrandtsen Co.*, 356 U. S. 481	11
Maryland Cas. Co. v. *Citizens Nat. Bank of West Hollywood*, 361 F. 2d 517	9
Merritt v. *Cameron*, 137 U. S. 542	11

Page

Shiver v. *United States*, 159 U. S. 491 13
Skidmore v. *Swift & Co.*, 323 U. S. 134 11
Squire v. *Capoeman*, 351 U. S. 1 14
United States v. *Healey*, 160 U. S. 136 11
United States v. *Missouri Pac. R. Co.*, 278 U. S. 269 ... 11
Wilbur v. *United States*, 281 U. S. 206 11
Wilbur v. *United States*, 53 F. 2d 717, certiorari denied, 284 U. S. 687 13
Wyoming v. *United States*, 255 U. S. 489 13
Yosemite Valley Case, 15 Wall. 77 13

STATUTES:

Act of April 15, 1874, c. 96, 18 Stat. 28 3
Act of May 1, 1888, c. 213, 25 Stat. 113 3
Act of May 30, 1908, c. 237, 38 Stat. 358 .....3, A11
Section 7 .....3, A11
Section 8 .....3, A12
Section 13 .....4, 14, A14
Mineral Leasing Act of 1920 4
Act of May 29, 1924, c. 210, 43 Stat. 244 4
Act of March 3, 1927, c. 299, 44 Stat. 1347 4
Act of March 3, 1927, c. 376, 44 Stat. 1401..3, 4, 5, 6, 7, 8, A14
Indian Mineral Leasing Act of May 11, 1938, c. 198, 52 Stat. 348 5
25 U. S. C. §§396a *et seq.* 5
25 U. S. C. §398 4
25 U. S. C. §398a 4
30 U. S. C. §§181 *et seq.* 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION, MONTANA, *Petitioners*,

v.

R. E. NORDWICK, Executor of the will and estate of ARTHUR L. NORDWICK, deceased, *et als.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION, MONTANA, your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on May 19, 1967.

OPINIONS BELOW

The opinion of the district court (R. 63-80) is not reported.[1] The opinion of the court below (Appendix A, *infra*, pp. A1-A10) has not yet been reported.

---

[1] "R." refers to the unprinted record used below, the pagination of which, however, does not include the separately bound exhibits, Pet. Ex. 1-63 and Resp. Ex. 64-65. All those exhibits will be cited simply by number; those offered by petitioners are listed at R. 19-25.

JURISDICTION

The judgment of the court below (Appendix B, *infra*, p. A11) was entered on May 19, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether administrative practice on the part of the General Land Office that construed an Indian statute to the detriment of an Indian tribe is sufficient in any circumstances to deprive such tribe of valuable oil and gas interests, in the absence of any showing that such administrative practice was concurred in or even brought to the attention of the Bureau of Indian Affairs.

2. In 1935, an entryman was issued a patent for land that contained a reservation of oil and gas to certain Indian tribes. Twenty years later, in 1955, the Bureau of Land Management issued to this same entryman a supplemental patent for the previously reserved oil and gas, without notice to the Indian tribes thereby divested, in the face of rulings by two legal officers of the Interior Department that the oil and gas belonged to the Indian tribes, and so swiftly that the Indian tribes affected could neither intervene nor appeal to the Secretary. In an action by the Indian tribes against the entryman to compel reconveyance of the oil and gas interests, the district court held the supplemental patent invalid as to one-third of the acreage involved, and the entryman did not appeal. The validity of the balance of the supplemental patent was sustained both by the district court and the court of appeals, in the latter tribunal despite the representation of the United States, made at the request of that court, that the supplemental patent divesting the Indian tribes of oil and gas had been illegally issued.

The question presented is whether the court below correctly held that the issuance of the remaining two-thirds of the supplemental patent in those circumstances can be

sustained on the basis of a showing of administrative practice by the General Land Office in respect of not reserving oil and gas to the Indian tribes.

3. The Fort Peck Indian Reservation Act of March 3, 1927, c. 376, 44 Stat. 1401, reserves to the Indian tribes living there the oil and gas underlying tribal lands that are "undisposed of" on the date of its enactment. The question presented is whether land is "undisposed of" within the meaning of that Act where, prior to its date, the land had been entered, but the entryman did not until after the date of the Act fulfill the statutory conditions of settlement, cultivation, or payment, all of which were requisite to his entitlement to a patent.

STATUTES INVOLVED

The provisions of the statutes involved are set forth in Appendix C, *infra*, pp. A11-A15.

STATEMENT

A. The Basic Statutes

In 1888, the Fort Peck Indian Reservation was carved out of a larger reservation that Congress had established in 1874. Act of May 1, 1888, c. 213, 25 Stat. 113, 116; Act of April 15, 1874, c. 96, 18 Stat. 28. All of the land within the Fort Peck Indian Reservation was tribal. Then, in 1908, Congress directed that a portion of the tribal land be allotted in severalty, and that the remainder, referred to a "surplus" or as "ceded in trust" land, be appraised and "disposed of under the general provisions of the homestead, desert-land, mineral, and town-site laws of the United States" for the appraised value, but not less than $1.25 per acre. Section 7 of the Act of May 30, 1908, c. 237, 35 Stat. 558, 561, *infra*, pp. A11-A12.

Section 8 of the 1908 Act (35 Stat. at 561-562) provided that "when an entryman shall have complied with

all the requirements of the homestead law and shall have submitted final proof within seven years from date of entry and shall have made all required payments aforesaid, he shall be entitled to a patent for the lands entered." *Infra*, p. A13. Section 13 of the 1908 Act (35 Stat. at 563) further required "that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof * * *." *Infra*, p. A14.

In the 1920's, the Fort Peck Indian Reservation came to be considered valuable for oil and gas, but neither the 1908 Act nor any other statute then provided for oil and gas leasing of "surplus" or "ceded in trust" Indian lands.[2] Accordingly, the 1908 Act was amended by the Act of March 3, 1927, c. 376, 44 Stat. 1401 (*infra*, pp. A14-A15), "by specifically reserving to the Indians having tribal rights on said reservation the oil and gas in the tribal lands undisposed of on the date of the approval of this Act," and by authorizing oil and gas leasing by the "tribal council, with the approval of the Secretary of the Interior and under such rules and regulations as he may prescribe." *Infra*. p. A15.

B. Nordwick's Entries and the Leasing of the Reserved Oil and Gas

Arthur L. Nordwick, respondents' predecessor in title (hereinafter "Nordwick"),[3] filed a homestead application

---

[2] The Mineral Leasing Act of 1920, 30 U.S.C. §§ 181 *et seq.*, did not apply to Indian lands, see *Haley* v. *Seaton*, 281 F. 2d 620, 623 (D.C. Cir.), while the existing statutes for leasing oil and gas on unallotted Indian lands were applicable only to treaty reservations (Act of May 29, 1924, c. 210, 43 Stat. 244; 25 U.S.C. § 398) and to executive order reservations (Act of Mar. 3, 1927, c. 299, 44 Stat. 1347; 25 U.S.C. § 398(a)). The Fort Peck Indian Reservation, as has been seen, was created by statute.

[3] Nordwick died during the pendency of the action, after which his executor and devisees, the present respondents, were substituted as parties in his stead (R. 87).

for the single tract of land now involved, containing 160 acres (NW ¼, Sec. 34), on January 24, 1925 (Pet. Ex. 1). To quote the court below (*infra*, p. A2), "When the 1927 Act was passed, Nordwick had paid only one fifth of the purchase price, had not satisfied the statutory cultivation requirements (43 U.S.C. § 218(d)), and had not submitted the required final proofs (43 U.S.C. § 164)." He tendered final proof in 1929, which was conditionally accepted in 1930 subject to payment of the balance due, but the final certificate was not issued until such payment was made, in 1935 (Pet. Ex. 19-21, 31, 51, 64). A patent issued on December 13, 1935, with a reservation of oil and gas under the 1927 Act (Pet. Ex. 53; Pretrial Order, ¶ IV-3, R. 30).

On May 25, 1929, after the 1927 Act, Nordwick filed a second homestead application for an 80-acre tract (W ½ NE ¼, Sec. 34). This was rejected, subject to the applicant's consent to a reservation of oil and gas to the tribes, consent which was then given (Pet. Ex. 7, 9, 11). Proof was made and accepted and final certificate issued as in the case of the larger tract (Pet. Ex. 22-24, 31, 51, 64), and the same patent that issued in 1935 with the oil and gas reservation already mentioned covered the entire 240 acres comprised in both tracts (Pet. Ex. 53; Pretrial Order, ¶ IV-3, R. 30).

Twenty years after Nordwick received his patent that reserved oil and gas to the petitioner tribes, the tribal oil and gas underlying his land was offered at a Bureau of Indian Affairs lease sale held at the Fort Peck Agency on September 2, 1955, pursuant to the Indian Mineral Leasing Act of May 11, 1938, c. 198, 52 Stat. 347 (25 U.S.C. §§ 396a *et seq.*). On September 5, 1955, Carter Oil Company entered the high bid (Pet. Ex. 63, pp. 40-45), which was accepted by the Tribes (Pretrial order, ¶ V-1-5c; R. 31), with the result that a lease was executed by Carter Oil and the Tribes (Pet. Ex. 54, 1st ¶; Pet. Ex. 59).

C. Conveyance of the Tribes' Reserved Oil and Gas Without Notice to Them

Following the tribal sale, Carter Oil on November 15, 1955, acquired from Nordwick a quitclaim oil and gas lease to the 240 acres (Resp. Ex. 65), after which Carter Oil advised the Bureau of Indian Affairs on December 9, 1955, that it had investigated the title and had concluded that Nordwick owned the oil and gas (Pet. Ex. 54).

Four days later, Nordwick requested the Secretary of the Interior to issue him a corrected patent eliminating the oil and gas reservation (Pet. Ex. 55); this was 20 years to the day after the date of the original patent (Pet. Ex. 53). The Field Solicitor of the Department ruled that title to the oil and gas was in the Tribes, and that Carter Oil was not entitled to have its lease with the Tribes rescinded (Pet. Ex. 56, 57). On March 23, 1956, Assistant Solicitor Bradshaw in the Department at Washington ruled, in a memorandum citing authorities, that the lands in question were "undisposed of" on the date and within the meaning of the 1927 Act; accordingly, he refused to indorse a "draft decision" of the Bureau of Land Management which undertook to hold that Nordwick was entitled to the oil and gas (Pet. Ex. 60).

The "draft decision" appears to be the same as the final decision of May 4, 1956 (Pet. Ex. 61). That final decision was indorsed "Bradshaw 4/17" (Pet. Ex. 61), but the files of the Department are silent regarding the reasons for Assistant Solicitor Bradshaw's change of view between March 23 and April 17 of the same year. At any rate, the Bureau's final decision granted Nordwick a supplemental patent eliminating the reservation of oil and gas under the 1927 Act (Pet. Ex. 61), and five days later, on May 9, 1956, such a supplemental patent duly issued, reciting that the patent of 1935 had erroneously included a reservation of oil and gas (Pet. Ex. 62).

At no time prior to the issuance of the supplemental patent was any notice or opportunity given the Tribes to present their views, or to defend the Tribes' title, or to participate in the proceedings that culminated in the issuance of the supplemental patent to Nordwick. The *ex parte* procedure thus followed by the Bureau of Land Management disregarded the explicit earlier advice of the Field Solicitor that the Tribes should be notified and given an opportunity to be heard (Pet. Ex. 56; Dist. Ct. Op., R. 67 n. 2).

When the matter finally did come to the Tribes' attention, they appealed to the Secretary on April 11, 1957 (R. 67). No decision was forthcoming, and the present action was brought on July 24, 1963 (R. 1). Thereafter, following oral argument of the present cause in the district court, the Tribes' appeal to the Secretary was dismissed on the footing that, since the supplemental patent had already issued, the Department was without jurisdiction to hear the appeal (R. 58-62; R. 67 and n. 3).

D. Proceedings in the District Court

This action was brought by the Tribes against Nordwick seeking a judgment that the Tribes are the beneficial owners of the oil and gas underlying the 240 acres conveyed by the patent and supplemental patent (R. 4); for a judgment that Nordwick convey such oil and gas to the Tribes (R. 4); and for money damages (¶ 3, R. 55-56).

The district court held, as to the 160-acre tract, that the words "undisposed of" in the 1927 Act would not include lands where an entry had been made before the date of the 1927 Act even though none of the statutory requirements for a patent had been satisfied, and accordingly ruled in Nordwick's favor in respect thereof (R. 68-74, 79). As to the 80-acre tract, however, the district court ruled that since Nordwick's entry was made after the date of the 1927 Act, the land was "undisposed of"

on that date, with the result that the oil and gas underlying the smaller tract belonged to the Tribes (R. 74-75, 80).

Following substitution of the present respondents in consequence of Nordwick's death (R. 87), judgment was entered accordingly (R. 88-89).

The Tribes appealed from the judgment adverse to them as to the 160-acre tract (R. 90); the respondents acquiesced in the judgment adverse to Nordwick in respect of the 80-acre tract, a judgment that has long since become final.

E. Proceedings in the Court Below: Views of the United States There Expressed at Court's Request

On July 7, 1966, two days after the Tribes' appeal was argued in the court below, that tribunal requested the views of the United States regarding the proper construction of the 1927 Act as applied to the present case.[4]

The United States filed a brief setting forth its view that the ruling of the district court "was erroneous." It attached to its brief a copy of Assistant Solicitor Bradshaw's memorandum of March 23, 1956 (Pet. Ex. 60), which set forth reasons and authorities why Nordwick's land was "undisposed of" when the 1927 Act became law. It also attached to its brief a letter from the Solicitor of the Department of the Interior, dated July 27, 1966, which concurred in the original Bradshaw view, citing cases. And the United States' brief further called attention to the rule that doubtful expressions in Federal legislation dealing with Indians must be resolved in their favor, citing

---

[4] Oral argument was had on July 5, 1966 (R. 103). The order entered on July 7 was as follows: "The Solicitor General is requested to submit his views with respect to the proper construction of the Act of March 3, 1927, see chapter 376, 44 Stat. 1401, as applied to this case, within sixty days of the date hereof, the cause then to be submitted."

Maryland Cas. Co. v. *Citizens Nat. Bank of West Hollywood*, 361 F. 2d 517 (C.A. 5).

Nonetheless, the court below, without once mentioning the views of the United States that the court had solicited, decided the case on May 19, 1967, against the Tribes. After reciting considerations *pro* and *con*, after saying that (*infra*, p. A9) "It would be idle to pretend that the choice between these conflicting indicia of congressional intent is clear; and regrettably, in this instance Congress cannot readily correct us if we err", the court below concluded (*infra*, p. A9) that "The consideration we find compelling in favor of the entrymen in this case is the virtually unbroken administrative practice of issuing patents on pre-1927 homestead applications after passage of the 1927 Act without reserving oil and gas rights."

This rested on a submission by Nordwick in opposition to the Memorandum for the United States, viz. (*infra*, p. A7), "A partial survey of Land Office records, submitted to this court by Nordwick and unchallenged by the Tribes, discloses 157 patents issued after 1927 on homestead entries predating the 1927 Act which do not contain a reservation of oil and gas deposits."

REASONS FOR GRANTING THE WRIT

This case presents a particularly crass instance of the spoliation of Indian rights, one effected by means of a shocking administrative irregularity that the court below only footnoted, but which effectively deprived the Indians of every opportunity to be heard before they were divested of valuable oil and gas deposits by *ex parte* action. The decision now sought to be reviewed, which upholds the validity of the action thus taken, is contrary to the views of the United States, which the court below solicited—but then did not even mention in its opinion. And that decision, which is admittedly beyond the power of Congress to correct, was deemed impelled by the single factor found

controlling by the court below, namely, a presentation of administrative practice.

But, for reasons about to be developed, the factor of administrative practice is quite inadequate to support the result reached below, first because there was no consistent practice in this very case, second because the doctrine that gives controlling weight to administrative practice is necessarily inapplicable where a statute dealing with Indians has been construed by a bureau not charged with responsibility for Indian affairs.

First. The record in this case plainly demonstrates that there has been no uniformity in respect of the patent now in issue. As has been shown (*supra,* page 6), the Field Solicitor originally ruled that the Tribes owned the oil and gas (Pet. Ex. 56, 57), and so did Assistant Solicitor Bradshaw in the Department (Pet. Ex. 60). Less than a month later, the latter changed his position (Pet. Ex. 61), but while this case was *sub judice* in the court below, the United States at that court's request took the position that the Tribes did indeed own the oil and gas, and presented a communication from the Solicitor of the Department in support of that view.

Thus, in respect of the very patent in suit, the only consistency within the Department has been its inconsistency. It is true that the score in favor of these Indians was three to one—the Field Solicitor, Bradshaw the first time, and the Solicitor, for the Indians; and only Bradshaw the second time against them—but unhappily for the Tribes the patent divesting them of their property was issued on the strength of the minority ruling last mentioned.

Moreover, though it nowhere appears from the opinion below, there has been a further and striking inconsistency in this very litigation.

The patent sought to be cancelled (Pet. Ex. 62) conveyed to Nordwick the oil and gas underlying 240 acres. The

district court cancelled the patent as to 80 acres and directed reconveyance (R. 88-89); Nordwick did not appeal, and that part of the judgment has become final. It is only the balance of 160 acres purporting to have been conveyed by the identical patent that has been adjudged to Nordwick. Thus the judgment now in force actually splits the patent presently in issue.

Accordingly, this case is governed by a line of decisions here that the court below completely overlooked, decisions holding that, where the administrative practice has been inconsistent and not uniform, it is unpersuasive and hence cannot be given weight. *Merritt* v. *Cameron*, 137 U.S. 542, 552; *United States* v. *Healey*, 160 U.S. 136, 145; *United States* v. *Missouri Pac. R. Co.*, 278 U.S. 269, 280; *Burnet* v. *Chicago Portrait Co.*, 285 U.S. 1, 16; *Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 500; *Civil Aeronautics Board* v. *Delta Air Lines*, 367 U.S. 316, 332, 334; cf. *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140.

A practice as inconsistent as that shown here could not be made the basis for mandamus on the footing that the Secretary's duty was simply ministerial. See *Wilbur* v. *United States*, 281 U.S. 206.

It follows that to rely on administrative practice to overcome the irregularities disclosed by the present record, as the court below indeed did, is to disregard the unbroken teachings of this Court in a vital area and in a constantly recurring context.

Second. But even a uniform course of administrative action could still not be of controlling weight here, because, in two respects, it was not adversary. See *Fishgold* v. *Sullivan Drydock Corp.*, 328 U.S. 275, 290.

A. First and foremost, it is wholly unrealistic to consider that Indian rights are to be measured by the action of officials who are not charged with protection of the Indians. Not only is it the fact that the General Land Office and

its successor the Bureau of Land Management have always operated independently, in virtual isolation from the Bureau of Indian Affairs, joined only by the fragile nexus of the Secretary of the Interior's supervision, but their functions are and have been quite different, particularly during the critical period involved here. The General Land Office existed to give land away, the Bureau of Indian Affairs to protect and preserve such lands as the Indians still had left.

It would indeed be a most flagrant distortion of the doctrine of administrative practice, i.e., that special weight is to be accorded the acts of those charged with the execution of a particular statute, to hold, as the court below actually held, that what the General Land Office did over a period of years, *ex parte,* without hearing the views of those responsible for the protection of Indian rights, and in the absence of any decision at the Secretarial level, is to be given the effect of irrevocably limiting—here of destroying—Indian rights.

B. Specifically, the patent in suit, which divested the petitioner Tribes of their oil and gas 20 years after an earlier patent had reserved it to them, was issued without notice to them, without any opportunity whatsoever to be heard, and so swiftly that the only right of appeal available to them was actually cut off by the very act of which they now complain.

The Field Solicitor had specifically recommended that (Pet. Ex. 56, p. 2), "Since it is obvious that a property right of the Fort Peck Tribe is challenged, the Tribe should be notified of the raising of this question and given opportunity to be represented by its own counsel." That advice was ignored, two legal opinions favorable to the Tribes were also ignored, and the patent conveying away the Tribes' oil and gas was issued five days after the *ex parte* decision against them. Consequently, as the event

proved, they could neither intervene nor appeal (R. 58-62; R. 67 and n. 3).

Reliance even on uniform administrative practice in those circumstances adds up simply to legalizing a back-door taking.

Third. With the sole exception of the ruling now sought to be reviewed, every single decision on the substantive question is unanimous the other way. As the Solicitor of the Department of the Interior said, in the letter presented to the court below by the United States, "The published decisions of this Department over the past sixty years have time and again stated the position that lands entered under the homestead laws and similar laws may be withdrawn by the United States for any of several purposes before all requirements leading to the issuance of a patent have been satisfied. Similarly, before an entry has been perfected by performance of the entryman of all that he is required to do for a patent, the United States may reserve unto itself the mineral rights therein or require a waiver of the same under pain of cancellation of the entry. See *Mary C. Sands,* 34 L.D. 653 (1906); *Instructions,* 43 L.D. 294 (1914); *Cleveland Johnson (On Rehearing),* 48 L.D. 18 (1921); *Columbus C. Mabry (On Rehearing),* 48 L.D. 280 (1921); *Lee O. LaFlame,* 49 L.D. 324 (1922); *Arsene J. Martin,* 49 L.D. 608 (1923); *Jacob Terrell,* 49 L.D. 671 (1923)."

The courts, too, had up to now uniformly held that an entryman such as Nordwick does not earn his right to legal title until he has done all that the law requires of him, so that, at any time prior to that point, his inchoate rights may be withheld from him by Congress. *Wyoming* v. *United States,* 225 U.S. 489, 497-498, 501-502, *Shiver* v. *United States,* 159 U.S. 491, 497; *Yosemite Valley Case,* 15 Wall. 77, 87-88; *Wilbur* v. *United States,* 53 F. 2d 717, 720 (D.C. Cir.), certiorari denied, 284 U.S. 687. And, as

the United States represented to the court below (Memorandum, p. 3), "No reason appears why Congress should be considered to have exercised less than all of the authority it possessed to reserve minerals for the Indian Tribes."

Fourth. The present case deals only with the oil and gas underlying 160 acres. The ultimate decision herein will affect the oil and gas underlying perhaps 200,000 acres, and hence the property rights of the petitioner Tribes who number some 6000 persons—not a great deal of property, true enough, nor many persons, in the context of today's opulence and today's national population of nearly 200,000,000.

Actually, however, far more is involved. This case concerns the fiduciary obligations of the United States and its good faith as trustee of its Indian wards. Congress expressly provided in 1908 "that the United States shall act as trustee for said Indians to dispose of said lands" (Sec. 13, *infra,* p. A14). And this Court has many times said that "Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *Carpenter* v. *Shaw,* 280 U.S. 363, 367, quoted in *Squire* v. *Capoeman,* 351 U.S. 1, 6-7.

If the decision below is permitted to stand, then the back-door divestiture of these Tribes' oil and gas, reflected by the present record, which, as has been seen, was effected without notice to them, and with such unusual and indeed indecent haste that their right to be heard by their statutory guardian was irrevocably cut off, will have received judicial sanction, admittedly beyond hope of Congressional rectification.

Such a result, assuredly, would be "a sorry breach of faith with these Indians." *Squire* v. *Capoeman,* 351 U.S. 1, 10. Only this Court now has the power to avert the wrong that impends.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

MARVIN J. SONOSKY,
1225 — 19th Street, N. W.,
Washington, D. C. 20006,
Counsel for Petitioners.

FREDERICK BERNAYS WIENER,
1750 Pennsylvania Avenue, N. W.,
Washington, D. C. 20006,

JOHN M. SCHILTZ,
Electric Building,
Billings, Montana 59101,

Of Counsel.

JULY 1967.

APPENDIX A

OPINION BELOW

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20,440

ASSINIBOINE & SIOUX TRIBES, ET AL., *Appellants,*

vs.

R. E. NORDWICK, ET AL., *Appellees.*

[May 19, 1967]

Appeal from the United States District Court
for the District of Montana

Before: JERTBERG, BROWNING, and ELY, Circuit Judges

BROWNING, Circuit Judge:

The Act of May 30, 1908 (35 Stat. 558) provided that part of the land composing the Fort Peck Reservation was to be allotted among members of the Assiniboine and Sioux Tribes, and the remainder sold for their benefit. The unallotted lands were to be opened to settlement and entry under the homestead laws at prices to be fixed by appraisal. Homestead entrymen were to be allowed five years to pay the purchase price and seven years to make final proof entitling them to patents. Unallotted lands "remaining undisposed of" five years after the lands were opened to entry were to be sold at auction.

The 1908 Act was amended by the Act of March 3, 1927 (44 Stat. 1401) "specifically reserving to the Indians having tribal rights on said reservation the oil and gas in the tribal lands *undisposed of* on the date of the approval of this Act"

(emphasis added); and authorizing the Tribal council to lease the reserved oil and gas deposits.[1]

On January 24, 1925, Nordwick filed a homestead application on a 160-acre tract under the 1908 Act. When the 1927 Act was passed, Nordwick had paid only one fifth of the purchase price, had not satisfied the statutory cultivation requirements (43 U.S.C. § 218(d) (1964)), and had not submitted the required final proofs. 43 U.S.C. § 164 (1964). He completed these requirements in 1929, and received a patent in 1935.

The issue is whether the oil and gas rights in these 160 acres were reserved to the Tribes by the 1927 Act, or passed to Nordwick.

Land remains subject to the disposing power of Congress until a homestead or pre-emption entryman satisfies the conditions imposed by law for issuance of a patent, *Russian-American Co.* v. *United States,* 199 U.S. 570, 577 (1905); *Shiver* v. *United States,* 159 U.S. 491, 495-96 (1895); *Campbell* v. *Wade,* 132 U.S. 34, 38 (1889); *The Yosemite Valley Case,* 82 U.S. 77, 87 (1872); *Frisbie* v. *Whitney,* 76 U.S. 187, 195-96 (1869).[2] Congress therefore had power

---

[1] Congress provided a comprehensive scheme for leasing oil and gas deposits in public domain lands by the Mineral Leasing Act of 1920, 30 U.S.C. § 181 et seq. (1964). But this Act did not apply to Indian lands. Haley v. Seaton, 281 F.2d 620, 623 (D.C.Cir. 1960). Leasing of oil and gas deposits on unallotted Indian lands was authorized by the Act of May 29, 1924, 43 Stat. 244, 25 U.S.C. § 398 (1964) (applitable to treaty reservations), and the Act of Mar. 3, 1927, 44 Stat. 1347, 25 U.S.C. § 398(a) (1964) (applicable to executive order reservations). Oil and gas deposits on the Fort Peck Reservation were the subject of the special legislation, also adopted Mar. 3, 1927, 44 Stat. 1401, referred to in the text.

[2] Cf. Wyoming v. United States, 255 U.S. 489, 497-98 (1921); Ferry v. Udall, 336 F.2d 706 (9th Cir. 1964); Miller v. Udall, 317 F.2d 573, 576 (D.C.Cir. 1963); Willcoxson v. United States, 313 F.2d 884, 887-88 (D.C. Cir. 1963); Haley v. Seaton, 281 F.2d 620, 623-24 (D.C.Cir. 1960).

to amend the 1908 Act to reserve oil and gas deposits in land subject to an unperfected homestead entry. The question is whether Congress intended to do so.

I

Considerations supporting the conclusion that Congress intended by the 1927 Act to reserve oil and gas deposits in land subject to an unperfected homestead claim may be summarized as follows.

1. In public land law,[3] "disposal" often refers to "that final and irrevocable act by which the right of a person, purchaser, or grantee, attaches, and the equitable right becomes complete to receive the legal title by a patent or other appropriate mode of transfer. Until that act the land is not disposed of * * *." *Oregon* v. *Frakes*, 33 L.D. 101, 103 (1904). See also *Grant* v. *Oregon*, 2 L.D. 641 (1883); *Oil prospecting Permits in Power Site Reserves*, 48 L.D. 459, 462-65 (1921). Under these authorities, tribal lands "undisposed of" would include land subject to an unperfected homestead entry.

2. Because statutes withdrawing tribal lands from further alienation commonly include provisions expressly preserving outstanding but unperfected rights,[4] it may be

---

[3] Nordwick argues that public land law is not applicable because the 1908 and 1927 Acts relate to Indian lands rather than lands in the public domain. Public land law authorities are relevant because sections 7 and 8 of the 1908 Act provide that the unallotted lands "shall be disposed of" in accordance with the laws relating to disposition of the public domain, and the 1927 Act is amendatory of the earlier statute.

[4] E.g., Act of Aug. 10, 1939, ch. 662, § 1, 53 Stat. 1351, 25 U.S.C. § 463(d); Act of July 27, 1939, ch. 387, § 5, 53 Stat. 1129, 25 U.S.C. § 575; Act of June 18, 1934, ch. 576, § 3, 48 Stat. 984, 25 U.S.C. § 463(a) (1964). Cf. Act of Aug. 15, 1953, ch. 509, § 2, 67 Stat. 592 printed in the historical note following 25 U.S.C. § 611.

argued that the omission of such a savings clause from the 1927 Act is to be taken as deliberate.

3. The evident purpose of the Act of 1927 was to further the interests of the Indians[5] by reserving oil and gas deposits to be leased for their benefit. This purpose would best be served by giving maximum scope to the language of the reservation.

4. In its dealings with Indians the United States "has charged itself with moral obligations of the highest responsibility and trust" (*Seminole Nation* v. *United States,* 316 U.S. 286, 297 (1942)), and section 13 of the 1908 Act declares that "the United States shall act as Trustee for said Indians to dispose of said [unallotted] lands." *Cf. Ash Sheep Co.* v. *United States,* 252 U.S. 159, 166 (1920); *Hanson* v. *United States,* 153 F.2d 162, 163 (10th Cir. 1946). The language of the amendatory Act of 1927 is to be construed in this context; and there are considerations of equity and fairness which support a broad construction of the oil and gas reservation, and its related authority for leasing the reserved rights. Leasing is a fairer method of realizing the value of oil and gas deposits than permitting them to pass with the surface rights for no additional consideration. Congress was aware of this fact. Leasing was adopted as the exclusive method for disposing of oil and gas deposits in public domain lands by the Mineral Leasing Act of 1920, 30 U.S.C. § 181 et seq. Furthermore, oil and gas deposits in public domain lands subject to homestead entry when the Mineral Leasing Act of 1920 was enacted did not pass to the entryman, but were reserved by the United States to be leased for its

[5] The Act of 1927 was confined to oil and gas deposits because "the interests of the Indians are cared for under existing law with respect to the proceeds from the sale of their surplus lands, including coal and mineral lands * * *." H. R. Rep. No. 1966, 69th Cong., 2d Sess. (1927). S. Rep. 1632, 69th Cong., 2d Sess. (1927).

own benefit.[6] It is argued that Congress must have intended to achieve a result no less favorable to the Indians as to oil and gas deposits in lands which the United States held in trust for their benefit.

5. Finally, the Tribes invoke the settled rule of interpretation that "statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Alaska Pac. Fisheries* v. *United States*, 248 U.S. 78, 89 (1918). See also *Squire* v. *Capoeman*, 351 U.S. 1, 6-7 (1956); *United States* v. *Santa Fe Pac. R.R.*, 314 U.S. 339, 354 (1941); *Maryland Cas. Co.* v. *Citizens Nat'l Bank*, 361 F.2d 517, 521 n. 16 (5th Cir. 1966); *Federal Indian Law* 566 (G.P.O. 1958). A "liberal construction" resolving "doubtful expressions * * * in favor of the Indians" would treat lands subject to unperfected entries as "undisposed of."

II

Looking to the other side, the following considerations suggest that Congress did not intend to include lands under homestead entry in the phrase "undisposed of" in the 1927 Act, and thus deprive entrymen of oil and gas deposits.

1. The phrase "undisposed of" also appears in section 11 of the Act of 1908,[7] and in this context it concededly does

---

[6] However, entrymen were granted a preference right to lease oil and gas deposits in their lands (30 U.S.C. § 229 (1964); Skeen v. Lynch, 48 F.2d 1044, 1047 (10th Cir. 1931)), a right which would not be available in the present situation if the 1927 Act were construed as the Tribes suggest.

[7] The pertinent part of § 11 of the 1908 Act reads:

> That all lands hereby open to settlement remaining *undisposed of* at the end of five years from the date of President's proclamation to entry shall be sold to the highest bidder for cash at no less than $1.25 per acre, under regulations to be prescribed by the Secretary of the Interior * * * (emphasis added).

not include lands under entry. This is clear, for Congress could not have intended that lands in the process of acquisition by an entryman should become subject to sale at auction after five years when the statute allowed the entryman seven years to perfect his right to a patent by submitting his final proof—particularly since the price obtainable by auction was less than that obtainable by disposition to the entryman.[8] Accordingly, contemporaneous administrative interpretation of the phrase "undisposed of" in section 11 of the 1908 Act excluded lands under entry. *Lands Within Former Fort Peck Indian Reservation. Instructions,* 46 L.D. 380 (1918). It can be argued that the same language in the amendatory Act of 1927 was presumably used with the same meaning.

2. Section 9 of the Act of August 1, 1914, 35 Stat. 582, authorized the Secretary of Interior to allot surplus Fort Peck Reservations lands to Indian children in accordance with the Act of 1908 "as long as surplus lands within said reservation remain *undisposed of.*" (Emphasis added.) Here again it is conceded that the critical phrase excludes land under entry, for Congress could not have intended to expose entrymen to loss of their unperfected homesteads by allotment.[9]

3. On January 18, 1929, the Commissioner of the General Land Office issued instructions that, "In the future in all

---

[8] Section 8 of the 1908 Act provided that the homestead price was to be fixed by appraisal at the land's actual value, but in no event at less than $1.25 per acre. The same minimum applied to sale at auction at the end of five years, but sale was authorized at the end of ten years with no minimum.

[9] See also meaning ascribed by the Department of Interior to the phrase "not otherwise reserved or disposed of" in the Act of Feb. 27, 1917, 39 Stat. 944, 30 U.S.C. § 87 (1964). Circulars and Regulations of the General Land Office, Jan. 1930, 709-10. We do not agree with the Tribes that this ruling is based upon the ground that a special statute controls over a later general one.

applications for homestead entries of Fort Peck lands or applications for reinstatement of cancelled entries of such lands, you will require the applicant to file a consent to the reservation of oil and gas to the Fort Peck Indians in accordance with" the 1927 Act. Circulars and Regulations of the General Land Office, January 1930, 715-16 (G.P.O. 1930). In a subsequent interpretation of these instructions it is said that they "directed that the reservation be made upon future applications, and made no such requirement as to pending unperfected entries at the date of the act, which implies the construction that something less than a complete equitable title and vested right to a patent constituted a disposal under the act." *Mineral Reservations in Trust Patent for Allotments to Fort Peck and Uncompoligre Indians*, 53 I.D. 538, 544 (1931).[10]

4. A partial survey of Land Office records, submitted to this court by Nordwick and unchallenged by the Tribes, discloses 157 patents issued after 1927 on homestead entries predating the 1927 Act which do not contain a reservation of oil and gas deposits. Only one contrary instance is called to our attention— the initial patent issued to Nordwick in the present case.[11] Moreover, the exclusion of oil and gas deposits from Nordwick's original patent may have

---

[10] In Raymond Bear Hill, 52 L.D. 688, 691 (1929), it was stated that land is "disposed of" for the purposes of the 1927 Act if "it is no longer subject to other disposal or reservation"—a description which might include land under homestead entry. But as the Tribes point out, the language goes beyond the requirements of the case since the claimant was an Indian allottee who had done all the law required of him to perfect his right to a patent. Cf. Wyoming v. United States, 255 U.S. 489, 497-98 (1921).

[11] Counsel for the Tribes states that one additional application (Karge, G.F. 074447) has been filed asserting a right to oil and gas in a homestead entry, but the circumstances are not disclosed.

resulted from clerical error, and was in fact corrected by issuance of a supplemental patent.[12]

5. Finally, Nordwick suggests two reasons why Congress would have intended to preserve the claim of holders of unperfected homestead entries to the oil and gas deposits in their tracts. First, disposition of the lands to entrymen under the homestead act at the appraised prices was the preferred method, for it resulted in greater return to the

---

[12] Nordwick sought patents on two tracts—the 160-acre tract involved in this appeal, and an 80-acre tract on which Nordwick filed an additional homestead application on May 25, 1929, two years after the passage of the 1927 Act. Nordwick was required to sign a waiver consenting to the reservation of oil and gas deposits in the latter tract only, and the Assistant Commissioner of the General Land Office instructed the field office that the oil and gas was to be reserved under the 1927 Act as to this tract. Nonetheless, the final certificate and patent issued by the field office was not drawn in accordance with these instructions but reserved oil and gas in both tracts.

In 1955, twenty years after Nordwick received his patent, the Tribes leased the reserved rights to Carter Oil Company. After a title investigation, that company advised the Department of Interior that it thought the reservation of oil and gas was improper. Nordwick requested the Secretary of Interior to issue a corrected patent. In February 1956 the Department's Field Solicitor ruled that the reservation was proper. The Bureau of Land Management arrived at the opposite conclusion, and submitted a draft decision to that effect to the Assistant Solicitor of the Department. The Assistant Solicitor refused to endorse the draft decision. The Bureau nonetheless issued a corrected patent to Nordwick on May 9, 1956, eliminating the reservation of oil and gas.

Indians.[13] Homestead entrymen would be encouraged to continue on the land and complete their payments if they were allowed to retain the oil and gas; they would be discouraged from doing so if they were not. Second, Congress may well have felt that it would be unfair to deny oil and gas rights to prior entrymen who had invested time, effort, and money on the expectation that these rights would be included in their patents.

III

It would be idle to pretend that the choice between these conflicting indicia[14] of congressional intent is clear; and regrettably, in this instance Congress cannot readily correct if we err.

Except for one factor, we would follow the interpretive guide that doubtful language in Indian legislation is to be resolved in favor of the Indians. The consideration we find compelling in favor of the entryman in this case is the virtually unbroken administrative practice of issuing patents on pre-1927 homestead applications after passage of the 1927 Act without reserving oil and gas rights. This practice seemingly reflects a uniform contemporaneous inter-

---

[13] See note 8. Congressional preference for disposal under the homestead laws is reflected in repeated amendments of the 1908 Act extending the time given homestead entrymen to complete payment of the purchase price of their homesteads. Act of March 2, 1917, ch. 148, 39 Stat. 994-95; Act of Dec. 11, 1919, ch. 4, 41 Stat. 365-66; and the Act of Mar. 4, 1925, ch. 533, 43 Stat. 1267. The auction sales contemplated by the Act of 1908 were in fact never held. The Fort Peck Indians of the Fort Peck Reservation, Montana v. United States, No. 183 (Indian Cl. Comm'n, June 8, 1954).

[14] We have omitted contentions based upon generalizations as to the nature of a homestead entryman's claim. Compare Mr. Justice Pitney's statement that an entryman "has a substantial inceptive title" (Knapp v. Alexander Co., 237 U.S. 162, 167 (1915)) with Mr. Justice Brewer's remark that a homestead entry "amounts to nothing more than a declaration of intention." Whitney v. Taylor, 158 U.S. 85, 95 (1895).

pretation of the 1927 Act by persons presumably familiar with its background and purpose, and we are persuaded by it.

As the Supreme Court said in a case involving similar circumstances, "Many thousands of acres have been patented to individuals under that interpretation, and to disturb it now would be productive of serious and harmful results. The situation therefore calls for the application of the settled rule that the practical interpretation of an ambiguous or uncertain statute by the Executive Department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed except for very cogent reasons." *Logan* v. *Davis,* 233 U.S. 613, 627 (1914). In addition to the authorities cited in *Logan,* see *United States* v. *Jackson,* 280 U.S. 183, 193 (1930); *United States* v. *Minnesota,* 270 U.S. 181, 205 (1926); *Swendig* v. *Washington Water Power Co.,* 265 U.S. 322, 331 (1924); *Blanset* v. *Cardin,* 256 U.S. 319, 326 (1921); *McLaren* v. *Fleischer,* 256 U.S. 477, 481 (1921); *LaRoque* v. *United States,* 239 U.S. 62, 64 (1915). See generally, Davis Administrative Law, § 5.06 at 324-38 (1958).

Accordingly, we conclude that withholding provisions of the 1927 Act did not apply to lands subject to pending but unperfected homestead entries under the 1908 Act.

IV

The district court rejected the Tribes' argument that Nordwick was barred by laches and estoppel on the ground that no prejudice appeared,[15] citing *Costello* v. *United States,* 365 U.S. 265, 282 (1961). We agree.

Affirmed.

---

[15] The Tribes did not raise this issue in their complaint, and it does not appear in the listing of their contentions in the pre-trial order. Rather, it was Nordwick who relied upon estoppel and laches based upon the seven-year lapse between issuance of the supplemental patent to Nordwick and the filing of suit by the Tribes.

APPENDIX B

JUDGMENT BELOW

[Caption omitted]

APPEAL from the United States District Court for the District of Montana.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Monana and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered May 19, 1967

APPENDIX C

STATUTES INVOLVED

1. The Act of May 30, 1908, c. 237, 35 Stat. 558, provides in pertinent part as follows:

SEC. 4. That upon the completion of said allotment the President of the United States shall appoint a commission consisting of three persons to inspect, classify, appraise, and value all of said lands that shall not have been allotted in severalty to said Indians or reserved by the Secretary of the Interior, said commission to be constituted as follows: One of said commissioners shall be a person holding tribal relations with said Indians, one a representative of the Indian Bureau, and one a resident citizen of the State of Montana.

* * * * * * * *

SEC. 7. That when said commission shall have completed the classification and appraisement of said lands and the same shall have been approved by the Secretary of the Interior the lands shall be disposed of under the general

provisions of the homestead, desert-land, mineral, and town-site laws of the United States, except sections sixteen and thirty-six of each township, or any part thereof, for which the State of Montana has not heretofore received indemnity lands under existing laws, which sections, or parts thereof, are hereby granted to the State of Montana for school purposes. And in case either of said sections, or parts thereof, is lost to the State by reason of allotment thereof to any Indian or Indians, or by reservation or withdrawal under the provisions of this act or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized to select other unoccupied, unreserved, nonmineral lands within said reservation, not exceeding two sections in any one township, which selections must be made within the sixty days immediately prior to the date fixed by the President's proclamation opening the surplus lands to settlement: *Provided,* That the United States shall pay to the said Indians for the lands in said sections sixteen and thirty-six, so granted, or the lands within said reservation selected in lieu thereof, the sum of one dollar and twenty-five cents per acre.

SEC. 8. That the lands so classified and appraised as provided shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when and the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation, until after the expiration of sixty days from the time when the same are opened ot settlement and entry: *Provided,* That the rights of honorably discharged Union soldiers and sailors of the late civil and Spanish Wars and the Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged, but no entry shall be al-

lowed under section twenty-three hundred and six of the Revised Statutes: *Provided further,* That the price of said lands shall be appraised value thereof, as fixed by said commission, which in no case shall be less than one dollar and twenty-five cents per acre for agricultural, grazing, and arid land, and shall be paid as follows: Upon all lands entered or filed upon under the provisions of the homstead law, there shall be paid one-fifth of the appraised value of the land when entry or filing is made, and the remainder shall be paid in five equal annual installments in one, two three, four, and five years, respectively, from and after date of entry or filing, and when an entryman shall have complied with all the requirements of the homestead law and shall have submitted final proof within seven years from date of entry and shall have made all required payments aforesaid, he shall be entitled to a patent for the lands entered: *Provided,* That aliens who have declared their intentions to become citizens of the United States may become such entrymen, but no patent shall be issued to any person who is not a citizen of the United States at the time of making final proof: *And provided further,* That the fees and commissions at the time of commutation or final entry shall be the same as are now provided by law where the price of land is one dollar and twenty-five cents per acre: *Provided,* That nothing in this act shall prevent a citizen of the United States from commuting his homestead entry under the provisions of section two thousand three hundred and one of the Revised Statutes by paying for the land entered the price fixed by said commission, receiving credits for payments previously made.

* * * * * * * *

SEC. 11. That all lands hereby opened to settlement remaining undisposed of at the end of five years from the date of President's proclamation to entry shall be sold to the highest bidder for cash at not less than one dollar and twenty-five cents per acre, under regulations to be pre-

scribed by the Secretary of the Interior; and any lands remaining unsold ten years after said lands shall have been opened to entry shall be sold to the highest bidder for cash, without regard to the minimum limit above stated: *Provided,* That not more than six hundred and forty acres shall be sold to any one person or company.

SEC. 12. That the lands within said reservation however classified, shall, on and after sixty days from the date fixed by the President's proclamation opening said lands, be subject to exploration, location, and purchase under the general provisions of the United States mineral and coal land laws at not less than the price therein fixed and not less than the appraised value of the land, except that no mineral or coal exploration, location, or purchase shall be permitted upon any lands allotted to Indians or withdrawn under the provisions of this act.

SEC. 13. That nothing in this act contained shall in any manner bind the United States to purchase any part of the land herein described, except sections sixteen and thirty-six, or the equivalent in each township, that may be granted to the State of Montana, the reserved tracts hereinbefore mentioned for agency and school purposes, or to dispose of lands except as provided herein, or to guarantee to find purchasers for said lands, or any part thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received.

2. The Act of March 3, 1927, c. 376, 44 Stat. 1401, is as follows:

That the Act of May 30, 1908 (Thirty-fifth Statutes, page 558), providing for the allotment, sale, and disposal of lands on the Fort Peck Indian Reservation, Montana, is hereby amended by specifically reserving to the Indians having tribal rights on said reservation the oil and gas in the tribal

lands undisposed of on the date of the approval of this Act; and leases covering such land for oil and gas may be made by the Indians of the Fort Peck Reservation through their tribal council, with the approval of the Secretary of the Interior and under such rules and regulations as he may prescribe.

Sec. 2. (a) That the title to certain lands on the Fort Peck Indian Reservation, Montana, reserved for agency, school, and other administrative purposes (embracing four thousand and ninety-four and one-hundredth acres), pursuant to the provisions of sections 3 and 16 of such Act, as amended, is hereby reinvested in the Indians having tribal rights on the Fort Peck Reservation, subject to the continued use of such lands for administrative purposes as long as needed for such purposes in the discretion of the Secretary of Interior.

(b) The Secretary of the Treasury is authorized and directed to deduct the sum of $5,117.52, representing the purchase price of such lands at the rate of $1.25 per acre, from moneys in the Treasury arising from the proceeds of the sale of lands disposed of under the provisions of such Act, as amended, and to credit the same to the United States as payment for the lands title to which is reinvested in accordance with the provisions of this section.

LIBRARY
SUPREME COURT, U. S.

FILED
AUG 12 1967
CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 387

ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION, MONTANA *Petitioners,*

v.

R. E. NORDWICK, Executor of the will and estate of ARTHUR L. NORDWICK, deceased, *et als, Respondents.*

RESPONDENTS' ANSWER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OTIS L. PACKWOOD,
705 Midland Bank Building
P. O. Box 840
Billings, Montana 59103

CHARLES LUEDKE,
705 Midland Bank Building
P. O. Box 840
Billings, Montana 59103

BAXTER LARSON,
Wolf Point, Montana 59201
Counsel for Respondents

[illegible] PRINTING & LITHOGRAPHING, BILLINGS, MONTANA

INDEX

	Page
Question presented	1
Petitioners' contention	3
1. Uniformity and Consistency of Administrative Practice	3
2. Administrative Practice Not Adversary	7
3. Authorities Cited By Solicitor	10
4. Widespread Effect	11
Conclusion	12

AUTHORITIES

Cases:

Fort Peck Indians v. United States, 132 F. Supp 222	9
Logan v. Davis, 233 U.S. 613, 627 (1914)	3,7
Skidmore v. Swift & Company, 323 U.S. 134	10
United States v. Leslie Salt Co., 350 U.S. 383, 396	6

Statutes:

Act of May 30, 1908, 35 Stat. 558	1
Act of June 15, 1926, 44 Stat. 746	4
Act of March 3, 1927, 44 Stat. 1401	2
Act of April 20, 1936, 49 Stat. 1235	4
Act of February 18, 1875, Ch. 80. Sec. 1, 18 Stat. 317, since amended and now existing as 43 USCA Sec. 2	7,8

Departmental Decisions:

Mineral Reservations in Trust Patents for Allotments To Fort Peck and Uncompahgre Ute Indians, 53 I.D. 538, 544	8,9

Text Books:

2 Am Jur 2d, Sec. 242, p. 69	9

IN THE

Supreme Court of the United States

October Term, 1967

No. 387

ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION, MONTANA *Petitioners,*

v.

R. E. NORDWICK, Executor of the will and estate of ARTHUR L. NORDWICK, deceased, *et als, Respondents.*

RESPONDENTS' ANSWER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

R. E. NORDWICK, Executor of the will and estate of Arthur L. Nordwick, deceased, et als, your Respondents, pray that the writ of certiorari requested by Petitioners herein, be denied.

Respondents take no issue with respect to matters set forth by Petitioners under headings OPINION BELOW, JURISDICTION, STATUTES INVOLVED, and STATEMENT and commence their answering brief with:

QUESTION PRESENTED

There is but one basic question involved in this case. Under the Act of May 30, 1908, 35 Stat 558 (Pet. Br. All-14) the surplus lands on the Fort Peck Indian Reservation were made

available for entry by homesteaders without oil and gas reserved. By the Act of March 3, 1927, 44 Stat 1401 (Pet. Br. A14-15) Congress amended the 1908 Act to provide that the oil and gas would be reserved to the Indians having tribal rights on said reservation ". . . in the tribal lands undisposed of on the date of the approval of this Act; . . .".

In 1925 Nordwick had filed his entry on the 160 acres involved. It was allowed and in good standing on the date of the Act of March 3, 1927. The question is whether the 1927 Amendment applies to this entry i.e., was the land "disposed of", because the Nordwick entry existed, or "undisposed of" because the entry, although existing in good standing, was not then completed as to all requirements and all payments, they not yet being due.[1] If "disposed of" Nordwick would be entitled to the oil and gas. If "undisposed of" the oil and gas would remain with the tribe.

The Circuit Court, speaking through Judge Browning, has set forth the various contentions on both sides, concluding that none of them make completely clear the result Congress intended by the language "undisposed of" as applied to these facts. (Pet. Br. A3-9) Submitted to the Circuit Court, however, was evidence, unrefuted by the Tribes, that the Government had, in at least 157 other similar cases, regarded a pending entry as making the land disposed of and patents in all these cases issued without reserving oil and gas.[2]

On this basis, Judge Browning stated: "This practice seemingly reflects a uniform contemporaneous interpretation of

---

[1] Sec. 8, 1908 Act required full payment in 5 years and final proof in 7 years. (See Pet. Br. A12-13) Nordwick's entry was on January 24, 1925, or about 2 years old at the time of the 1927 Act.

[2] Pet. Br. A7-8. The 157 entries reported were the product of a partial survey of Land Office records, Billings, Montana, submitted in response to Memorandum For The United States which overlooked consulting, and failed to reflect, government Land Office records pertaining to the administrative practice on Nordwick-type entries. No incidents of patents being issued which reserved the oil and gas appear, except the original 1935 Nordwick patent involved in this case. As to it, the evidence shows the oil and gas was reserved by clerical error, contrary to instructions and was later corrected.

the 1927 Act by persons presumably familiar with its background and purposes, and we are persuaded by it."[3] The statement of the Supreme Court in the case of *Logan vs. Davis*, 233 U.S. 613, 627, is then quoted, supported by citation of other authorities.[4]

PETITIONERS' CONTENTIONS

The essence of petitioners' position, as we are able to understand it, is that the application of this rule is improper because the administrative practice relied upon was (1) not consistent or uniform,[5] (2) was not adversary,[6] (3) is contrary to the authorities cited in 1966 by the Solicitor of the Department of Interior,[7] and (4) will affect the oil and gas under perhaps 200,000 acres of land.[8] These contentions will be discussed in the order in which petitioners have presented them.

(1) UNIFORMITY AND CONSISTENCY OF ADMINISTRATIVE PRACTICE

Petitioners do not cite any evidence of general inconsistency or nonuniformity in the administrative practice, but contend only that there was no consistent practice in this very case.

By citing alleged inconsistencies in practice in this very case, petitioners are referring, not to the original Nordwick patent issued in 1935, but the supplemental patent issued in 1956 correcting the previous erroneous reservation of oil and gas. The acts relied upon as demonstrating inconsistency are

---

[3] Pet. Br. A9-10. This conclusion is fortified by Petitioners' acknowledgement that as many as 200,000 acres may be involved (Pet. Br. p. 14). Since we are concerned only with lands filed upon prior to the 1927 Act, these 200,000 acres are ones already patented. The 157 patents listed in the partial survey of land office records cover 34,043.57 acres.

[4] Pet. Br. A10
[5] Pet. Br. pp. 10-11
[6] Pet. Br. pp. 11-12
[7] Pet. Br. pp. 13-14
[8] Pet. Br. p. 14

itemized in Petitioners brief (page 10). A list of them, with their dates indicated, is as follows:

Field Solicitor's Ruling, dated 2-14-56 (Pet. Ex. 56)

Assistant Solicitor Letter, dated 3-23-56 (Pet. Ex. 60)

Decision approving supplemental patent, dated May, 1956 (Pet Ex. 61)

Memorandum of United States, dated August, 1966.

To orient the significance of the dates of these actions, a brief review of the time period pertinent to the commencement and operation of the administrative practice in question is important.

Commencing with patents issued subsequent to March 3, 1927, the effect of the language in the 1927 Act had to be determined on every pre-1927 Act entry. Entries made subsequent to March 3, 1927 did not give rise to the problem because the oil and gas clearly remained in the tribe. Therefore the time span in which the administrative practice could operate was from March 3, 1927, forward to the date of filing of this suit in July, 1963, or a period of 36 years. During all of this time, so far as we have evidence on the point, post-1927 Act patents issued on pre-1927 Act entries without oil and gas reserved, except in the case of the Nordwick patent. Upon discovery of this fact Nordwick requested corrective action in November, 1955, and it was granted by the issuance of a supplemental patent on May 19, 1956 vesting him with the oil and gas which had previously been erroneously reserved. It is logical to assume that by this date all pre-1927 Act entries had been completed and patents therefor, when authorized, had been issued.[9]

---

[9] The record in this case does not contain proof as to the date of the last patent on pre-1927 Act entries. The 1908 Act allowed full payment in 5 years and final proof in 7 years (Sec. 8, 1908 Act, Pet. Br. A13), but a series of extension acts were passed (Note 13, Pet. Br. A9, to which can be added as further examples the Act of June 15, 1926, 44 Stat. 746 and the Act of April 20, 1936, 49 Stat. 1235, plus such additional time as administrative appeals might consume). The latest known patent issued, as appears from the partial survey of Land Office records in evidence in this case, was on January 26, 1942 under Serial Great Falls 065689. Since 14 more years passed between that date and the issuance of Supplemental Patent to Nordwick on May 19, 1956, the assumption that final action on all pre-1927 Act entries had by then been taken seems justified.

In the course of events surrounding Nordwick's request for correction of his original patent, the Solicitor's Office first disagreed that he was entitled to the oil and gas (Pet. Ex. 60) but later endorsed the departmental decision ordering the issuance of supplemental patent. (Pet. Ex. 61) Thus, the practice followed for what was then the preceding 28 years was reaffirmed and the treatment accorded Nordwick was conformed to that given the hundreds of other similarly situated homesteaders. Such action, in spite of temporary disagreement by the Solicitor's Office, was concluded without discord in the department. However, 10 years later when the Circuit Court, in the process of this case, requested the views of the Solicitor-General, a new Solicitor adopted and republished the prior temporarily held view that the oil and gas belonged to the Tribes, and on that basis the Department of Justice concurred. It is obvious that neither the Solicitor nor the Department of Justice were aware that the author of the letter on which they relied had changed his views and endorsed the decision which authorized the supplemental patent. Also, it is obvious that neither was aware of the longstanding past practice on pre-1927 Act entries or that hundreds of other patents and thousands of acres of land would be affected if their views were followed.

Petitioners now ask the Court to review and reverse the lower Court because of an exchange of different opinions within the department which produced no change in administrative practice and occurred (in 1956) after 29 years of not reserving oil and gas in patents covering Nordwick-type entries. Even more extravagant is the contention that the 1966 expression by the Solicitor and The Department of Justice,[10] founded upon the prior but rescinded 1956 views of the Assistant Solicitor, should be accepted as demonstrative of inconsistency in administrative practice. Opinions expressed subsequent

---

[10] See Memorandum For The United States, filed in this action at the request of the Circuit Court.

to the time the administrative action has run its full course cannot be considered interruptions or inconsistencies with respect to matters fully performed and completed years prior thereto.

> "Against the Treasurery's prior longstanding and consistent administrative interpertation it's more recent ad hoc contention as to how the statute should be construed cannot stand".
>
> *United States v Leslie Salt Co.* 350 U.S. 383, 396; 76 S. Ct. 416, 424; 100 L. Ed, 441 (1956)

In summary: Within a matter of months following passage of the 1927 Act, the practice was commenced of issuing patents without oil and gas reserved on pre-1927 entries.[11] This fact undeniably demonstrates a contemporaneous interpretation, made by those familiar with the background and purposes of the enactment, and it has been consistently reaffirmed without interruption by the later issuance of hundreds of other patents covering thousands of acres of land. The inconsistencies alleged by petitioner do not in fact exist because, first, they produced no change in administrative practice and, second, came in point of time after the administrative practice had on all other entries run its full course.

Further, petitioners allege that there has been a striking inconsistency in this very litigation. (Pet. Br.pp10-11) This refers to the fact that the original patent and the supplemental patent covered 240 acres. The District Court declared the Tribe to be the owners of the oil and gas under the 80 acres, but found Nordwick to be the owner as to the remaining 160 acres.

We fail to see how this is in any way pertinent to the question of administrative practice. The two tracts represent separate homestead entries, one on the 160 acres filed in 1925 and the other on 80 acres filed in 1929. Final proof was submitted on both at the same time and they were combined under one patent, but the factual and legal situations of each are different. The 80 acre tract was filed after the 1927 Act and

---

[11] See Answer of Appellees to Memorandum For the United States.

the 160 acre tract was filed prior thereto. The alleged inconsistency of treatment by the lower Court just does not exist.

(2) ADMINISTRATIVE PRACTICE NOT ADVERSARY

Petitioners contend that even if the administrative practice were uniform it should not be controlling because it was not adversary in that the practice was carried out by the General Land Office (now The Bureau of Land Management) rather than the Bureau of Indian Affairs. (Pet. Br. p-11)

The applicable rule, as phrased in the case relied upon by the lower Court, is as follows:

> "This situation therefore calls for the application of the settled rule that the practical interpretation of an ambiguous or uncertain statute by the Executive Department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed except for very cogent reasons." *Logan vs. Davis,* 233 US 613, 627.

No magic is claimed for the words "Executive Department". Whether a department, bureau, committee or agency it is the action taken by the instrumentality charged by Congress to act which gives the interpretive assistance.

As to the lands here concerned, the 1908 Act directed that they be disposed of under the general provisions of the homestead, desert-land, mineral and townsite laws of the United States. (Sec. 7, 1908 Act, Pet. Br. A 11) This placed the responsibility upon the Department of the Interior, within which the then existing law prescribed that it should act through the General Land Office.

> "The Commissioner of the General Land Office shall perform under the direction of the Secretary of the Interior all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority

of the Government." (R.S. Sec. 453; Feb. 18, 1875, Ch. 80, Sec, 1, 18 Stat. 317; since amended and now existing as 43 USCA Sec. 2.)

Therefore, the General Land Office was the administrative agency specifically designated by Congress to execute those provisions of the 1908 Act relating to the disposal of surplus lands. The effect given to General Land Office practices should not be destroyed by differences of opinion appearing years later as to whether a different agency could or should have been designated by Congress. Action taken in issuing hundreds of patents without oil and gas reserved was accomplished by the agency charged with the responsibility, and the controlling weight accorded by the lower Court was proper.

Petitioners apparently feel that in spite of specific Congressional direction, General Land Office actions should not be allowed to operate against Indian interests unless, in the process, such interests were represented by the Bureau of Indian Affairs, or had Secretarial approval. Because this contention is raised now for the first time in their petition the record contains no direct proof on the point. Therefore, the court is asked to indulge the assumption, totally unsupported by any evidence, that a complete lack of liason existed between the two agencies, and that the practices of the General Land Office during all of the years of handling pre-1927 Act entries were conducted without the participation, or even the knowledge, of the Bureau of Indian Affairs or the Secretary of the Interior or his office. This is an inconceivable assumption when it is realized that the 1908 Act covered not only homestead entries by non-Indians, but Indian allottments as well, necessarily tieing the activities of the two agencies together in such manner that one could hardly perform its function under the 1908 Act without the cooperation and participation of the other. Further, this assumption is directly refuted by a statement contained in instructions issued November 13, 1931, by First Assistant Secretary Dixon to the Commissioner of the General Land Office, 53 I.D. 538, 544, as follows:

"It is also noticed that the regulations of January 18, 1929 (Circulars and Regulations of the General Land Office, 1930, pp 715-716), providing for the reservation of oil and gas under the Act of March 3, 1927, in homestead entries made upon the Fort Peck lands directed that the reservation be made only upon future applications, and made no such requirement as to pending unperfected entries at the date of the act, which implies the construction that something less than a complete equitable title and vested right to a patent constituted a disposal of the land under the act."[12]

In light of this there is no question but what the practice of the General Land Office was known at the Secretarial level and by it approved through failing to direct otherwise.

In addition, the pattern of action and interaction between the Land Office and Bureau of Indian Affairs occurring under the 1908 Act is apparent from the contents of Findings and Conclusions, in evidence in this case, of the Indian Claims Commission, Docket No. 183 (Fort Peck Indians of the Fort Peck Reservation, Montana vs. United States, affirmed by the Court of Claims, 132 F. Supp. 222.). Applications by homesteaders for reappraisement of their lands necessitated constant contact between the two agencies.

Against this evidence and the presumption supporting the acts of Government officials, [13] there certainly is no justification for assuming that hundreds of patents, covering probably 200,000 acres of surplus Indian lands, over a period of many years

---

[12] These instructions pertained specifically to an Indian allotment and demonstrate that the statutory construction problem of the 1927 Act existed as to such allotments. A schedule of Fort Peck allottments was completed February 28, 1927, but not approved until October 21, 1927 (p. 543). The contention had been raised as in this present case, that the words "undisposed of" import a final disposition of, and a vested right to the land, but the First Secretary found that the actual practice on Indian trust patents, as well as homestead patents, was to the contrary. Thus, the Bureau of Indian Affairs was applying the same interpretation of the 1927 Act to Indian allotments as the General Land Office was to pre-1927 homestead entries.

[13] 2 Am Jur 2d, Sec. 242, p. 69

were issued without the knowledge and participation of the Bureau of Indian Affairs or their mutual supervisor, the Secretary of the Interior.

Petitioners' application of the adversary principle in any event is misplaced. In the process of handling homestead entries the General Land Office was adversary to every entrymen to the extent of putting him on proof of his compliance with the requirements entitling him to a patent. Even if this adversary element did not exist, its lack would not be determinative against the lower Court's decision.

> "The fact that the Administrator's policies and standards are not reached by trial in adversary form does not mean that they are not entitled to great respect. This Court has long given considerable and in some cases decisive weight to Treasury decisions and to interpretive regulations of the Treasury and of other bodies that were not of adversary origin." *Skidmore vs. Swift & Company,* 323 US 134.

Petitioners also make issue of the fact that the corrective supplemental patent issued to Nordwick in 1956 was granted without prior notice to the Tribe. Respondents agree with the lower Courts that it would have been the better practice for the Department to have given notice to the tribes. (Pet. Br. p. 12) However, in not doing so, no statute or regulation was violated. The question presented was one of law rather than fact. The act of issuing the supplemental patent in the manner in which it was done, is significant only to the extent that it evidences a continuation of the consistent and uniform prior administrative practice with reference to lands covered by pre-1927 Act entries. The Indians have not been deprived of their day in Court. They have been in Court since 1963.

(3) AUTHORITIES CITED BY SOLICITOR

Petitioners seek to place the lower Courts in error on the basis of a 1966 letter written by the Solicitor which cites authorities demonstrating that on any homestead entry the United

States may withdraw the land or reserve the minerals at any time before all requirements leading to the issuance of a patent have been satisfied. (Pet. Br. p. 13)

Respondents have consistently conceded the validity of this statement and the authorities cited in support of it. Respondents agree that the United States could reserve the oil and gas. The question, however, is not whether they could have but did, by use of the language "undisposed of". Therefore, these authorities miss the point. The language used by Congress is ambiguous and uncertain and no direct evidence exists which pinpoints its exact intention. It is for this reason that the interpretation given at the time, by the agency which understood its purposes and was charged with its execution, was considered controlling by the lower Court.

Petitioners now seek, after the entire function of the 1927 Act has been performed, to impose rules which existed then, but were not considered applicable by those best positioned to know the objectives and purposes of the Act. Certainly, after the functions of the law have run its course and been fully performed, the many, many entrymen whose rights and interests have become fixed, should not be penalized because the theories of another generation of administrators acting after the fact and having no rapport with the purposes and objectives of the 1927 Act, feel that what was done should have been done differently.

Patent on the face of the letters written by the Solicitor's Office, commencing in 1956 and in the Government Memorandum of 1966, is a complete lack of knowledge of, or interest in, the past practices of the Government in patenting which may be as much as 200,000 acres of pre-1927 Act entries. Being totally unaware of these facts, it is understandable that they are citing completely inappropriate authorities.

(4) WIDESPREAD EFFECT

Petitioners acknowledge and respondents agree that although this case involves the oil and gas under 160 acres, the final decision will affect oil and gas underlying perhaps 200,000

acres of former Indian land. Petitioners view is that the lower Court decision deprives the tribe, but the true fact is that we are not concerned with 200,000 acres of land which is to be patented in the future, but that same amount of land which was patented long ago, some of it as many as 40 years ago. Thus, it is the homesteaders, not the tribe, who for all of this time have presumably been vested with the oil and gas and they will suffer the deprivation if the decision of the lower Court is reversed. Such loss and all the problems created by it will also extend to the heirs, assigns, lessees and mortgagees of these entrymen.

CONCLUSION

It is submitted that the decision of the lower Court is correct and the petition of the Tribes should be denied.

Respectfully submitted,

OTIS L. PACKWOOD,
705 Midland Bank Building,
P. O. Box 840,
Billings, Montana 59103

CHARLES LUEDKE
705 Midland Bank Building,
P. O. Box 840,
Billings, Montana 59103

BAXTER LARSON
Wolf Point, Montana 59201
Counsel for Respondents

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 387

ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION, MONTANA, PETITIONERS

v.

R. E. NORDWICK, EXECUTOR OF THE WILL AND ESTATE OF ARTHUR L. NORDWICK, DECEASED, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

By order of October 9, 1967, the Solicitor General was invited to express the views of the United States with respect to this case.

This suit was brought by petitioners, the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservations to determine their rights to oil and gas underlying two tracts, one of 160 acres and the other of 80 acres, which had once formed part of the Reservation lands. The defendant (respondent here) is the estate of a homesteader who acquired the tracts after the unallotted lands of the former Reservation were opened for entry by the Act of May 30, 1908, 35

282-818—67

Stat. 558—which authorized the allotment of parcels to the individual members of the Tribes and provided that the remainder should be sold by the United States, for the account of the Indians, "under the general provisions of the homestead, desert-land, mineral, and town-site laws." § 7 of the Act (Pet. A11–A12). The title of the homesteader is not disputed, but the Tribes claim the minerals under an Act of March 3, 1927, 44 Stat. 1401, which amended the Act of 1908 "by specifically reserving to the Indians having tribal rights on said reservation the oil and gas in the tribal lands undisposed of on the date of the approval of this Act" (Pet. A14–A15). The validity of the Indians' claim to the minerals underlying the smaller tract is no longer in controversy—the entry having been filed more than two years after the 1927 Act became effective. The remaining issue is whether or not the courts below were correct in rejecting their claim with respect to the 160-acre tract on the ground that the homesteader's entry, initiated before 1927 but perfected several years after the new statute, amounted to a "disposition" of the land which would render the 1927 Act inapplicable.

The question is not without difficulty. The opinion of Judge Browning for the court of appeals very clearly sets out the considerations on either side (Pet. A3–A9) and it would serve no purpose to repeat them here.[1] In the court below, the United States, upon

[1] We note, however, that the opinion below appears erroneously to assume that homesteaders in Nordwick's position might have had a legitimate "expectation" before 1927 that oil and gas rights would ultimately be patented to them (Pet. A9). The fact is that, then as now, known minerals are excluded from patents

invitation, supported the construction of the 1927 Act contended for by the Indians and we adhere to that view. On the other hand, we recognize that the issue is close, and that, in light of intervening administrative action with respect to at least 157 other parcels[2]—many doubtless now held by innocent third-party purchasers—such a ruling would be seriously disruptive. See *Logan* v. *Davis*, 233 U.S. 613, 627. Moreover, although substantial acreage already patented is affected, the question is not of recurring importance for the future. In the circumstances, the United States—accepting the ultimate ruling in this case as controlling its action—is willing to acquiesce in the decision below.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1967.

---

issued to homesteaders. See 30 U.S.C. 121; 43 U.S.C. 201. Indeed, like other homesteaders, Nordwick, in making final proof in 1929, expressly represented that there were no indications of minerals of any kind on the land (Pl. Ex. 21).

[2] Apparently, 157 patents which do not reserve oil and gas rights have been issued for Fort Peck Reservation lands to homesteaders who, like Nordwick, filed their entries before 1927 but perfected them only in later years. The court below noted that the reservation of the oil and gas deposit in the original Nordwick patent may have resulted from a clerical error because it covered both the 160-acre tract at issue here and the 80-acre tract with respect to which he had signed a consent to the reservation of oil and gas deposit (Pet. A7–A8).

U.S. GOVERNMENT PRINTING OFFICE: 1967